80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

FILED
JUN 19 1981

DAMES & MOORE, a partnership,

Petitioner,

v.

DONALD T. REGAN, THE SECRETARY OF THE TREASURY OF THE UNITED STATES OF AMERICA, and THE UNITED STATES OF AMERICA,

Respondents,

and

THE ISLAMIC REPUBLIC OF IRAN, THE ATOMIC ENERGY ORGANIZATION OF THE ISLAMIC REPUBLIC OF IRAN, and BANK MARKAZI IRAN,

Intervenor-Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF CERTAIN BANKS AS *AMICI CURIAE* IN SUPPORT OF JUDGMENT

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Morgan Guaranty Trust Company of New York, Bank of America National Trust and Savings Association, Chemical Bank, The First National Bank of Chicago, Union Bank, California, Republic National Bank of New York, The Chase Manhattan Bank, N.A., Philadelphia Na-

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tional Bank, Mellon Bank, N.A., Mellon International Finance Corporation, Citibank, N.A., Manufacturers Hanover Trust Company, Wells Fargo Bank, N.A., European-American Banking Corporation, European-American Bank and Trust Company, Marine Midland Bank, N.A., The Bank of New York, Irving Trust Company, and American Express International Banking Corporation (the "Banks") respectfully move this Court for leave to file the accompanying brief in this case as *amici curiae* supporting the President's power

1. to nullify post-November 14, 1979 attachments under the International Emergency Economic Powers Act and

2. to suspend litigation in the United States against Iran.

The Banks have an interest in this case in that they are holding in excess of $1.5 billion for the account of Iran and various Iranian entities. The Banks also have an interest in that they have substantial unsatisfied claims against Iran and various Iranian entities.

The United States has ordered the Banks to transfer these Iranian assets to the Federal Reserve Bank of New York in order to implement by July 19, 1981 the executive agreement with Iran which resolved the hostage crisis. However, the Banks, as well as many other garnishees, have been served with judicial orders of attachment which direct them to continue to hold the Iranian assets. The Banks and other garnishees thus risk possible liability to attaching creditors if they transfer the Iranian assets as ordered by the United States, or sanctions imposed by the United States if they fail to transfer the assets. Neither the Petitioner in this case nor any other party before this Court is faced with the dilemma confronting the Banks and other garnishees.

A number of the Banks have appeared before the Court on two previous occasions in the Iranian assets litigation. In *Electronic Data Systems Corporation Iran* v. *The Social Security Organization of the Government of Iran, cert. denied,* No. 80-2035 (U.S. June 8, 1981), a number of Banks argued that the Court should not grant *certiorari* before judgment because that case did not present the critical issue of whether existing orders of attachment would prevent the Banks and other garnishees from transferring Iranian assets as ordered by the Executive. Certain Banks then appeared as *amici curiae* to urge that the Court grant *certiorari* in the present case because it does present the critical issue. *Dames & Moore* v. *Regan, cert. granted,* No. 80-2078 (U.S. June 11, 1981). Having urged the Court to hear this case, the Banks believe it is now incumbent upon them to inform the Court how, in their view, the issue of Executive authority should be decided.

Accordingly, it is respectfully requested that the Banks be given leave to file the following brief as *amici curiae.*

Date: New York, New York
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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT BEFORE JUDGMENT

BRIEF OF CERTAIN BANKS AS *AMICI CURIAE* IN SUPPORT OF JUDGMENT

On April 28, 1981 petitioner filed an action seeking injunctive relief against the respondents' interfering with proceedings, including writs of attachment issued by the District Court, in petitioner's prior action entitled *Dames & Moore* v. *Atomic Energy Organization of Iran*, No. CV 79-04918 LEW (C.D. Cal.). The April 28 complaint also

included a request for a declaratory judgment that the international agreements resolving various disputes between the United States and Iran, and the Executive Orders and regulations purporting to implement those agreements, were void insofar as they purported to authorize any such interference with the prior action. The District Court denied petitioner's motion for a preliminary injunction and granted respondents' motion to dismiss for failure to state a claim upon which relief may be granted. *Dames & Moore* v. *Regan,* No. CV 81-2064 LEW (C.D. Cal., June 2, 1981). Petitioner appealed from these rulings to the Court of Appeals and sought a writ of certiorari before judgment, which this Court granted on June 11, 1981.

Statement of the Situation

The legal questions presented herein arise out of a series of Executive Orders issued by Presidents Carter and Reagan, first as national responses to actions taken by the Islamic Republic of Iran on and after November 14, 1979, and then as procedural steps for the international settlement of disputes arising from those actions. The purpose, content, timing, and effect of the various governmental actions have been carefully set forth in opinions of two Courts of Appeal, *American International Group, Inc.* v. *Islamic Republic of Iran,* Nos. 80-1779 *et al.* (D.C. Cir., decided May 22, 1981, opinion issued June 5, 1981) (Typewritten op. at 1-9); *Chas. T. Main International, Inc.* v. *Khuzestan Water & Power Authority,* Nos. 80-1027 *et al.* (1st Cir., May 22, 1981) (Typewritten op. at 2-7), and have been summarized by the Solicitor General in papers filed in the present case. The substance of those actions will be discussed herein, but not the details.

By Executive Order and Treasury regulations issued on and after November 14, 1979, all designated Iranian

property in the United States was frozen. Litigants with claims against Iran could commence actions against Iranian governmental entities, and obtain pre-judgment attachments against Iranian governmental property, only through revocable licenses issued by the Secretary of the Treasury.* Actions were commenced and attachments were obtained by many claimants on the basis of a general license issued by regulation, 31 C.F.R. §§ 535.504(a), 535.418 (1980). *See id.*, § 535.805 (1980) (revocability of license). The regulation, however, expressly precluded the entry or execution of any judgment. 31 C.F.R. § 535.504(b)(1) (1980).

More than a year after issuance of the freeze order and the regulations permitting pre-judgment attachment, prolonged and intense international diplomatic efforts led to the execution of a series of complex agreements among the Governments of Algeria, the United States, and Iran on January 19, 1981.** These agreements resolved, or provided procedures for resolving, a wide range of international disputes involving Iran and the United States. The disputes concerned among other things the trade embargo imposed by the United States; Iran's claim that the United States had been interfering in Iranian internal affairs; the disposition of the former Shah's property; the return of the hostages by Iran; and the return of Iranian property by the United States.

An essential element of the agreements—one that gave rise to the longest and most detailed provisions thereof—related to claims made by United States nationals against

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* *See* Executive Order 12,170, 44 Fed. Reg. 65,729 (1979); 31 C.F.R. 535.201, 535.203(e), 535.310, 535.502 (1980).

** *See, e.g.*, Declaration of the Government of the Democratic and Popular Republic of Algeria, initialed January 19, 1981; Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, initialed January 19, 1981.

Iranian governmental entities and to attachments issued against Iranian governmental property. The agreements provided that all domestically-held assets blocked by the Executive Order of November 14, 1979, as implemented, would be released within six months, that is, by July 19, 1981; that an international claims commission, the Iran-United States Claims Tribunal, would be established in The Hague and empowered to adjudicate, pursuant to designated United Nations arbitration procedures, claims asserted by United States nationals against Iranian governmental entities; that more than $3 billion, which had been held by United States banks outside the United States, would immediately be paid to satisfy the claims of various United States and foreign banks under syndicated loan agreements; that an escrow fund of $1.4 billion would be established out of the offshore deposits to satisfy certain additional claims of United States banks that had dealt with Iran; and that another escrow fund, initially in the amount of $1 billion but to be continually replenished by Iran at the $500 million level, would be established out of the domestically-held assets to satisfy other awards made by the Tribunal.

To implement the international agreements, Executive Orders were issued that among other things (1) revoked all licenses for pre-judgment attachments granted after November 14, 1979, and nullified the attachments, (2) directed bank garnishees to remit domestically-held assets to the Federal Reserve Bank of New York for transfer (pursuant to the agreements) to the $1 billion escrow fund or to Iran by July 19, 1981, and (3) suspended claims against Iranian governmental entities pending the submission thereof to the Claims Tribunal.*

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* *See* Executive Order 12,279 (January 19, 1981), 46 Fed. Reg. 7,919 (1981); Executive Order 12,294 (February 24, 1981), 46 Fed. Reg. 14,111 (1981).

Interest of *Amici Curiae*

The issues presented by this action, and by numerous other actions across the United States, involve the validity of the Executive Orders insofar as they nullified the orders of attachment and suspended the claims against Iran. The undersigned banks have an interest in these issues in that they are holding more than $1.5 billion for the account of Iran and various Iranian entities. The Executive Branch has ordered the banks to transfer these assets to the Federal Reserve Bank of New York in order to implement the international agreements, but court orders of attachment preclude any such transfer. The banks also have an interest insofar as they have substantial unsatisfied claims against Iran and various Iranian entities.

Preliminary Statement

The issues presented to this Court are of undeniable national concern at two levels:

1. The foreign policy and international economic interests of the United States counsel that a decision should be rendered upholding the Presidential actions. The failure of the United States to comply with the explicit asset transfer provisions of the January 19, 1981 United States-Algerian-Iranian agreements could be viewed by Iran (and by the international community) as a material breach of the international obligations of the United States, and Iran might therefore feel justified in renouncing or seeking relief from the agreements. Such actions on the part of the United States or Iran could have enormous and unpredictable international consequences for the United States' future relations with Iran and with others who rely upon Executive agreements.

2. Difficult, complex and significant constitutional issues are involved in this extraordinary situation, as reflected by the recent opinions of the Courts of Appeal for the District of Columbia and First Circuits. In these circumstances, judicial and constitutional considerations counsel against the acceptance of any assertions of Executive authority that are broader than needed to support the Presidential actions in the present case.

We respectfully submit that this Court can and should accomodate all of these national interests by expeditiously affirming the judgment below, and by confirming the validity of the Presidential actions, on grounds that will cover all of the so-called Iranian cases, but will be narrow enough not to give rise to sweeping interpretations in future cases.

Summary of Argument

1. The Executive Order nullifying post-November 14, 1979 attachments is a valid exercise of Presidential power under the International Emergency Economic Powers Act;

2. The Executive Order suspending claims against Iran is a valid exercise of Executive power in which Congress has acquiesced.

ARGUMENT

POINT I

The Executive Order Nullifying Post-November 14, 1979 Attachments Is Valid Under the International Emergency Economic Powers Act.

Executive Order 12,279, which nullified post-November 14, 1979 attachments of Iranian governmental assets, was based by President Carter upon five sources of express or

inherent power.* This Court need not address each of the claimed elements of Presidential power, since Section 203 of the International Emergency Economic Powers Act, 50 U.S.C. § 1702 ("IEEPA"), provides ample authority for the Executive Order.

Congress through IEEPA has specifically authorized the President to take action with the purpose and effect of Executive Order 12,279. Enacted by Congress in 1977 to protect the exclusive Federal power to conduct foreign policy, IEEPA authorizes the President, in periods of declared national emergency,** to prohibit the acquisition of, and to "nullify" or "void" the exercise of any right to, property in which a foreign country or national thereof has any interest. It also authorizes the President to "direct and compel . . . [the] transfer, withdrawal . . . or exportation" of such property. Executive Order 12,279 did no more—and no less—than (a) "nullify" the attachments previously granted by revocable licenses (which were in turn revoked) and (b) direct that the assets in question be transferred no later than July 19, 1981, all in accordance with the foreign policy of the United States in a declared national emergency.

The Courts of Appeal for the District of Columbia Circuit and the First Circuit have held that Executive Order 12,279 was authorized and valid under the provisions of IEEPA. *American International Group, Inc.* v. *Islamic Republic of Iran, supra* at 19-23; *Chas. T. Main International, Inc.* v. *Khuzestan Water & Power Authority, supra* at 8-13. No appellate court has held or suggested the contrary. *But see Marschalk Co.* v. *Iran Nat'l Airlines Corp.*, 79 Civ. 7035 (CBM) (S.D.N.Y., June 11, 1981).

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* The same bases were asserted by President Reagan in Executive Order 12,294 which, *inter alia,* ratified Executive Order 12,279.

** Such a declaration was issued with respect to the Iranian crisis. *See* Executive Order 12,170, 44 Fed. Reg. 65,729 (1979).

Petitioner, like other litigants, does not contend that the concededly "broad" language of IEEPA is on its face insufficient to authorize the voiding of the post-November 14, 1979 attachments. Rather, petitioner advances an anomolous argument based on the predecessor of IEEPA: since the language of IEEPA was derived from the Trading with the Enemy Act, a "makeshift patchwork" (*Guessefeldt* v. *McGrath*, 342 U.S. 308, 319 (1952)) which Congress intended in some respects to narrow by enacting IEEPA, this Court should ignore the plain language of IEEPA and construe that statute in light of the supposed purposes of and policy considerations underlying the Trading with the Enemy Act.*

The pronouncements of this Court do not justify such a methodology for construing the plain language of an act considered and enacted by Congress in 1977. Rather, they reaffirm the proposition that "absent clear evidence of a contrary legislative intention, a statute should be interpreted according to its plain language." *United States* v. *Apfelbaum*, 445 U.S. 115, 121 (1980). On the basis of the plain language of IEEPA, this Court should affirm the validity of Executive Order 12,279 insofar as it voided the post-November 14, 1979 attachments and ordered the transfer of Iranian property.

Finally, we note petitioner's argument that the President should not be permitted to "transfer" the Iranian assets since IEEPA provided that express congressional authorization was necessary before the President exercised the purportedly analogous power to vest assets in an alien property cus-

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* To the extent that the purpose and effect of the Trading with the Enemy Act may be pertinent to ascertaining the intended scope of IEEPA, the undersigned banks endorse the views of the District of Columbia and First Circuits concerning *Zittman* v. *McGrath*, 341 U.S. 446 (1951) and *Orvis* v. *Brownell*, 345 U.S. 183 (1953).

todian. Petitioner's argument fails because the "transfer" in the present case does not involve the United States Government's taking the property away from its owners; the transfer order herein does no more than facilitate the return of the property to Iran as soon as the attachments have been vacated.

POINT II

The Executive Order Suspending Claims Against Iran Is Valid.

Executive Order 12,294 was an essential step in the implementation of the international agreements described above. Those agreements established a Claims Tribunal to resolve all covered claims. The individual members of the Claims Tribunal have been selected in accordance with normal and accepted arbitration practice; the procedures will be established United Nations arbitration rules; the forum will be neutral and accessible; and large and renewable escrow funds will be available for the expeditious payment of adjudicated claims. Against this background, Executive Order 12,294 directed that all claims encompassed by the agreements be suspended pending referral thereof to the Claims Tribunal.

The undersigned banks submit that in the context of international agreements seeking to resolve a wide-ranging series of government-to-government disputes, this Court should affirm the power of the President to suspend proceedings in the United States while providing for an alternative forum to resolve United States nationals' claims against foreign government-controlled entities.

The authority of the President to take such action by executive agreement may be checked by Congress. However, Congress has, through long-standing practice, chosen to do

so only when and to the extent it deems its intervention to be necessary and appropriate. *See American International Group, Inc.*, v. *Islamic Republic of Iran, supra* at 30, 34. In the present context, the President has periodically reported to Congress as required by IEEPA, and the Senate Foreign Relations and Banking Committees have held hearings with respect to the Executive Orders. Congress—after thus actively following the Iranian crisis from its outset—has not in any way expressed disagreement with the Presidential actions or taken steps to modify any part of the underlying international agreements.

This case does not therefore involve an assertion of Executive authority unadorned by any semblance of Congressional authorization or acquiescence. *Compare Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952). Rather, it involves an assertion of limited Executive authority, as an occasional but necessary adjunct to the conceded power to conduct foreign policy by normalizing relations or recognizing governments. This exercise of authority has been supported for decades by the real, though tacit, assent of the Legislative Branch. *Cf Zemel* v. *Rusk,* 381 U.S. 1, 11-12 (1965) ("Under some circumstances, Congress' failure to repeal or revise in the face of such administrative interpretation has been held to constitute persuasive evidence that that interpretation is the one intended by Congress"). The historical recognition and acceptance of Presidential authority to settle claims by executive agreement without the formal, prior approval of Congress is a far more compelling demonstration of constitutional significance than any invocation of labels or rigid attempt to categorize artificially the dynamics of governmental action.

The Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.*, should not be read as an implied withdrawal of this

legislative assent. The Act, proposed by the Executive Branch, withdrew from the Executive Branch its traditional role of making suggestions of immunity in suits against foreign governments. The Act and its legislative history did not deal with situations where the Executive—far from granting immunity to the foreign government—negotiated new protections for the claimants (including in the present case the placing of substantial funds in escrow, the waiver of sovereign immunity by Iran and the agreement by Iran to worldwide enforceability of awards). The Act and its legislative history also did not purport to limit the Presidential authority to resolve international disputes by means of government-to-government agreements that include a claims settlement procedure for claims by United States nationals against foreign governments.

Petitioner concedes in its petition for a writ of certiorari (page 18) that "there is little indication that Congress considered emergencies such as the Iranian hostage crisis when it enacted the FSIA," and the limited legislative history cited by Judge Duffy at pages 28-29 of the typewritten *Marschalk* opinion is not inconsistent with this concession. Judge Duffy, in pointing to Congress' deletion of language that would have made the Foreign Sovereign Immunities Act subject to "future international agreements," overlooked the fact that the agreements under consideration were exemplified by "friendship, commerce, and navigation treaties . . . which touch the question of sovereignty" rather than by the kind of agreements under consideration here. Judge Duffy also overlooked the Legal Adviser's testimony indicating that under the Act, the State Department would no longer be in the business of making suggestions of sovereign immunity to the courts, but "its ability to make suggestions with respect to other questions would remain unimpaired." *See* Immunities of Foreign States, HEARINGS on H.R. 3493

Before the Subcommittee on Claims and Governmental Relations of the Committee on the Judiciary, 93rd CONG., 1st Sess., pp. 18, 15 (1973).

If, as the District Court held in *Marschalk, supra* at 53 *et seq.*, Congress had viewed the Act as limiting the Executive's authority to establish a claims settlement procedure in a situation like that presented here, or had viewed the Executive Orders as trenching on its prerogatives, it had ample opportunity to express those views in the hearings held in February of 1981 upon the international agreements settling the Iranian crisis. The Congressional failure to react, coupled with the silence of the Foreign Sovereign Immunities Act upon the questions at issue, strongly counsels against an expansive reading of the Act that would override decades of governmental practice, nullify important aspects of the settlements at issue and place the United States Government in breach of its international agreements. Such consequences should be risked, if at all, only if there has been a clear Congressional assertion of power that is inconsistent with the actions of the Executive. No such clear assertion of power has been made by Congress, and indeed the only indications are that Congress has acquiesced in the Executive's action.

As the Courts of Appeal for the District of Columbia and First Circuits have held, the Foreign Sovereign Immunities Act may be inapplicable for another reason: the Executive Orders did not remove from the federal courts their jurisdiction to hear claims against Iran, but rather settled the claims and thus modified the substantive law to be applied by the courts. An alternative approach would be for this Court as a discretionary matter to direct that in the unique circumstances presented herein, the lower courts should vacate the post-November 14, 1979 attachments but thereafter refrain from exercising their jurisdic-

tion, if any, to proceed with the Iranian cases. Rather, they should permit the cases to go forward in the alternative forum and with the additional protections provided by the Executive agreements.

By thus invoking the discretionary power not to exercise further jurisdiction over the Iranian cases, the Court would make it unnecessary to reach the constitutional issue of whether the Executive can require that those cases be suspended. Such abstention might be particularly appropriate here, since the United States claimants may in fact receive satisfaction through the means provided in the Executive agreements;* and since many such claimants (including the undersigned banks) are reserving all rights they may have or acquire, including for example rights against the United States Government, if they do not receive adequate compensation.** In such circumstances, a direction that the lower courts refrain from exercising further jurisdiction may be considered an appropriate vehicle for permitting the agreements to be implemented without ruling on a difficult constitutional issue that may never arise in the future. *Cf. Colorado River Water Conservation Dist.* v. *United States,* 424 U.S. 800, 813-14 (1976); *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, 767-68 (1972) (Opinion of Rehnquist, *J.*).

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* We note in this connection that many aspects of the agreements have already been effectuated. The hostages have been released. Assets held abroad by United States banks have been transferred. Some of the claims have been repaid. Procedures have been implemented to establish the Claims Tribunal. The members of the Tribunal have been selected in accordance with accepted arbitration practice. Substantial funds have been placed in escrow.

** Claimants who are barred from the Tribunal under Article II, paragraph 1 of the Claims Settlement declaration may pursue judicial remedies to the same extent otherwise permitted by their contracts.

CONCLUSION

This Court should affirm the validity of the Executive Orders and regulations at issue insofar as they vacate the post-November 14, 1979 attachments and suspend the claims of United States nationals pending the submission of the claims to the Iran-United States Claims Tribunal.

Dated: New York, New York
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I, BARTLETT H. MCGUIRE, a member of the Bar of this Court, do certify that I caused three copies each of the annexed Motion for Leave to File Brief as *Amici Curiae* and Brief of Certain Banks as *Amici Curiae* in Support of Judgment to be served this 19th day of June, 1981, by express mail, postage prepaid, upon the following counsel:

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